



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20541

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B-177165

August 23, 1973

The Honorable
The Secretary of the Navy

Dear Mr. Secretary:

In response to the letters of the Director of Contracts, Naval Electronic Systems Command (NAVELIX), dated June 4 and 21, 1973, we have reconsidered our decision 52 Comp. Gen. _____, B-177165, May 23, 1973, concerning the validity of contract R00039-72-C-0274, awarded to R.F. Communications, Inc. (RFC).

The facts of the case as stated in the above cited decision are as follows:

"RFC's bid was the only one received prior to the scheduled bid opening on August 29, 1972, in the second step of the two-step formally advertised procurement. The RFC bid was, by its terms, valid for 60 days. RFC protested to this Office, by telegram of October 2, 1972, the Navy's cancellation of the solicitation prior to contract award and the proposed resolicitation of bids which the Navy considered necessary because of certain alleged ambiguities in the solicitation. Prior to our decision to you of January 31, 1973, B-177165, sustaining the protest, RFC submitted a number of unsolicited extensions of its bid. The validity of its bid was successively extended to the following dates:

November 17, 1972; December 1, 1972; December 31, 1972;
January 15, 1973; January 25, 1973; and January 31, 1973.

"On the day of our decision of January 31, NAVELIX placed a call to RFC's Washington Office to request a 30-day extension and since the firm's representative was unavailable, a message requesting such extension was left for him. The record before us does not show that RFC expressly granted such extension. Instead, its representatives visited NAVELIX on February 5, 1973, and inquired as to what action the Navy intended to take in view of our decision sustaining the protest. RFC was advised that Navy intended to award a contract. The record also indicates that at the February 5 meeting it was RFC's position that its bid had expired on January 31, 1973, that it would not be extended beyond that date and that the bid could no longer be accepted.

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"The NAVILEX letter states that, pursuant to the decision of January 31, it prepared to award a contract to RFC and requested funds from the cognizant comptroller organization in the amount of the original bid by RFC. As a result of interim reprogramming actions, funds in that amount were not immediately available but were made available on February 28, the date the contract was executed."

However, RFC refused to acknowledge the validity of the contract and has not undertaken performance thereof, contending that its bid had expired on January 31, 1973, prior to the purported award.

In our decision of May 23, 1973, in response to a request from NAVILEX for our opinion as to the validity of the award of the subject contract, we concluded that the attempted award on the basis of RFC's original bid price was ineffective. Although we acknowledged that as a general proposition a protest to this Office had the effect of extending the protestor's offer pending disposition of the protest and, if proper, for a reasonable time thereafter, without an express extension of the bid, we also stated that the period of constructive extension must be determined on the basis of all the relevant circumstances. In concluding that RFC's bid was not effectively extended beyond January 31, 1973, we noted the following circumstances:

"In the present case, RFC expressly granted extensions of its bid for more than three months beyond the original 60-day acceptance period. The last two extensions, for ten and six days, respectively, indicated that time was becoming critical. From the record, we are unable to find any affirmative evidence of an intent by RFC to extend its offer beyond January 31. In its letter to NAVILEX of March 14, RFC explained in detail the changes in production and manufacturing economics surrounding its bid which would result in a loss contract to RFC if an award was accepted at the bid price. These contentions have not been disputed by the Navy."

It is urged in the letters requesting reconsideration of our May 23rd decision that based upon the decisions cited therein "RFC's bid must have been available for acceptance for a reasonable period after the date of your decision." It is also stated that in reaching our decision of January 31st we were not aware that RFC's bid, as extended, expired on the same date, and that had this circumstance been known our action in sustaining the protest would have been conditioned upon RFC granting a bid extension for a reasonable period of time. Moreover, it is argued that the several short bid extensions

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by RFC were intended to maintain the validity of the bid until such time as we reached a decision but there was no intention to extend its validity beyond that date and provide the Navy the opportunity to fulfill any directive to award RFC a contract. Furthermore, it is pointed out that at the time of the initial decision we could not have foreseen that RFC would refuse the award on February 5, 1973. In addition, it is noted that because of the protest and consequent delay in effecting this procurement and RFC's refusal to perform under the contract, the Government has been damaged. It is therefore argued that consideration of these circumstances requires the conclusion that RFC's bid was effectively extended until at least February 25th and the award is valid.

We recognize that there is merit in the Navy's position that in determining any period of constructive extension of a bid as a result of a decision favorable to a protestor, consideration should normally be given to the effect on the Government of the delay in the procurement process and, therefore, the agency concerned should be permitted a reasonable time to implement the decision. On the other hand, consideration of other factors may, as in the instant case, require the conclusion that any constructive extension of the bid beyond the date of the decision would be unfair to the protesting bidder.

With regard to the circumstances referred to in our May 23rd decision as indicating that RFC's bid extension should not be considered binding after January 31, you have challenged RFC's motive and intention in granting the various unsolicited extensions of its bid. However, we find no evidence in the record to support your suspicions and must therefore conclude that the extensions were made in good faith. Furthermore, we believe that the record reasonably supports the inference that RFC was becoming increasingly wary about the economics of accepting any award at its original bid price of some months before. In this connection, we note that RFC had not acted prior to the expiration of its January 31 extension to further extend its bid as it had done on several previous occasions. In addition, although a HAVILIX representative conveyed a request to RFC for an extension of its bid on January 31, no reply was forthcoming from RFC even though it apparently was not aware of our decision until receiving it in the mail on February 5, 1973, at which time RFC expressed the belief that its bid had expired on the 31st. Therefore, it appears that RFC had abandoned any intention to further extend its bid at the time our decision was issued.

Finally, we do not believe it is relevant to the present matter to speculate as to what our action would have been with respect to the January 31st decision had we known of the expiration of RFC's bid on that same date.

Accordingly, we adhere to the view previously expressed that in the particular circumstances the purported award was ineffective to bind RFC.

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However, we can understand the problem presented to a contracting agency by this type of situation. Accordingly, we intend to change our procedures to require from each protesting bidder in a preaward situation an undertaking to keep his bid open for a period after a decision on the merits sufficient to process an award.

Sincerely yours,

Paul S. Deblin

Acting Comptroller General
of the United States